Supreme Court, U.S.
FILED

(1)

95-898 OCT 5 1995

No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1995

WILLIAM T. SENTER,

Petitioner,

vs.

HUGHES AIRCRAFT COMPANY, and
ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553
a Labor Union,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERIKA W. SENTER
Attorney at Law
4199 Campus Drive
Suite 700
Irvine, California 92715
tel (714) 854-5309
fax (714) 854-4897

Counsel of Record
for Petitioner
William T. Senter

58

QUESTIONS PRESENTED

1.

When a court of appeals decides a case based upon a point or an issue not raised, or briefed, or argued by any party, does the due process right guaranteed to litigants by the Fourteenth Amendment, and/or the common law right of "fair procedure," compel that the parties be given opportunity to present supplementary briefs on that point or issue?

2.

The court below affirmed summary judgment in favor of an employer and a labor union on a claim for breach of a bargaining unit contract brought by a union member under 28 U.S.C. § 185(a) pursuant to the authority of *Vaca v. Sipes*, 386 U.S. 171, decided in 1967. In this era of quiescent "labor-management cooperation" when emasculated unions, struggling to survive under an avalanche of labor-choking company *mergers*, deal with dictatorial employers who decree the *downsizing* of the work force;

(1) when does the power of the labor union to act exclusively on behalf of its membership impinge impermissibly on the individual worker's ability to grieve a breach of the collective bargaining agreement and/or to defend his or her contractually guaranteed employment right, and

(2) what evaluation process must a court undertake to decide whether a union's decision not to pursue a member's grievance qualifies as a "good faith" discretionary judgment so as to preclude a finding that the union breached its duty of fair representation to the worker?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS WHY THE PETITION SHOULD BE GRANTED 12

I. CERTIORARI SHOULD BE GRANTED TO INVOKE THE COURT'S SUPERVISORY POWER 13

A.

Deciding the Appeal on a Point not Raised, not Briefed, and not Argued, and Denying a Party's Timely Request to be Heard on the Point, so Violates the Right to "Fair Procedure" as to Cry out for an Exercise of this Court's Power of Supervision. 13

B.

The Decision Below is Plainly Wrong 15

C.

A Summary Remand Order is Appropriate 16

II. CERTIORARI SHOULD BE GRANTED TO DECIDE AN IMPORTANT ISSUE 17

A.
This Case Presents an Important Question of Whether, in this new Era of Employer Dominated "Labor-Management Cooperation," the Unionized Employee's Right of Equal Access to the Court is Abridged by the Wide Latitude Given to a Union's Decision not to Arbitrate the Employee's Grievance. 17

B.
The Present, Nearly Unfettered Discretion the Courts accord a Union's Decision not to Proceed with a Worker's Grievance, Improperly Restricts the Union Member's Right to Sue. 18

C.
The Shield of "Fair Representation" Accorded a Union Should not Accrue to the Benefit of an Employer who Violates the Provisions of a Collective Bargaining Agreement. 20

CONCLUSION 21

APPENDIX "A"
APPEALS COURT, MEMORANDUM OF DECISION ... App.1

APPENDIX "B"
APPEALS COURT ORDER DENYING A REHEARING App. 7

APPENDIX "C"
TRIAL COURT ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ..... App. 8

APPENDIX "D"
(Denied) PETITION FOR REHEARING
TO US COURT OF APPEALS, 9TH CIRCUIT ..... App. 18

APPENDIX "E"
EXTENSION OF TIME TO FILE WRIT ..... App. 32

TABLE OF AUTHORITIES

CASES

Adoption of Alexander, 44 Cal 3d 875, 864 (1988) 15
Castelli v. Douglas Aircraft Co., 752 F2d 1480 (9th Cir. 1985) ... 19
Del Costello vs. Teamsters 462 U.S. 151, 164, fn. 14 (1983) 19
Fristoe vs. Reynolds Metals, 615 F2d 1209 (1980) 19
Hannah v. Larche, 363 U.S. 420 (1960) 13
McKane vs. Durston, 153 U.S. 684 (1893) 13
Peters vs. Burlington N.R.R., 931 F. 2d 534 (9th Cir. 1991)
Steelworker's v. Rawson, 495 U.S. 362 (1990) 19
United States v. Salazar, 805 F.2d 1394 (9th Cir. 1986) 14
Vaca v. Sipes, 386 U.S. 171 (1967) ..... i, 10, 12, 17, 18
Washington v. United States, 357 U. S. 348 (1958) 16

STATUTES

28 U.S.C. § 185(a) i
29 U.S.C. § 411(a)(4) 3, 20
California Government Code § 68081 ..... 3, 15
Ninth Circuit General Order 4.2 3
Supreme Court, Rule 10.1(a) 13
Supreme Court, Rule 16.1 16
United States Constitution, 14th Amendment ..... i, 2, 12, 13, 16

No.____

In The

Supreme Court of the United States

October Term, 1995

WILLIAM T. SENTER,

Petitioner,

vs.

HUGHES AIRCRAFT COMPANY, and
ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553
a Labor Union,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

_____o_____

Petitioner, WILLIAM T. SENTER, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

___o___

---

* All parties to the proceedings below are listed in the caption.

OPINIONS BELOW

The appeals court Memorandum of Decision (*infra*, App. 1-6; Appendix "A") is unreported, as is the decision not to rehear the appeal (*infra*, Appendix "B": App. 7)[1]. The opinion of the district court (*infra*, Appendix "C": App. 8-17) is unreported as well.

—o—

JURISDICTION

The court of appeals filed the judgment in question on April 20, 1995 (*infra*, Appendix "A": App. 1). A rehearing was requested, and denial of the Petition for Rehearing was filed on June 7, 1995 (*infra*, Appendix "B": App. 7). Upon Petitioner's application, on August 25, 1995, the Honorable Sandra Day O'Connor graciously granted Petitioner an extension of time to file the instant petition to and including October 5, 1995 (*infra*, Appendix "E" App. 32).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case raises substantial concerns involving both the procedural and the substantial "due process" provision, and, also, the "equal protection" provision of the Fourteenth Amendment to the United States Constitution which states:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny equal protection of the laws. . . ."

---

1. One of the pivots of this petition for certiorari is Petitioner's request to the Ninth Circuit Court to rehear his appeal; therefore, said "Petition for Rehearing" is, also, appended hereto (*infra*, Appendix "D": App. 18-31).

Further, this case is concerned with provisions of the written policy of the Ninth Circuit General Order 4.2, which states:

> **"Deciding Cases on Points Not raised and Argued**
> If a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it shall give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon that particular point."

* [As a point of interest and comparison to the Ninth Circuit General Order 4.2, this petition also refers the Court to California Government Code § 68081, which states:

> **"Appellate review; Supplemental briefing; Rehearing**
> Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than a denial for a petition for an extraordinary writ, based on an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." (emphasis added)]

Finally, this case involves concerns pertaining to the federal "employee bill of rights" protection guaranteed to members of labor organizations by 29 U.S.C. § 411(a)(4), which provides:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding. . . ."

—o—

STATEMENT OF THE CASE

The essence of this case is perhaps best summed up by the words Secretary of Labor, Robert Reich, used in his Labor Day, 1995, address to the nation.[2] "Meet the Frayed-Collar Workers Getting the Boot," he said.

Petitioner, William T. Senter ("Senter") "got the boot" not only from his employer and from his union, he, also, "got the boot" from the justice system and from the courts. The relevant facts can be gleaned from portions of the appeals decision (*at, App. 1-6*), the trial court decision in the case [*at, App. 8-12*], and the (denied) petition for rehearing [*App. 18-31*], set forth the background facts.

1. The employer and the breached collective bargaining agreement.

Defendant, Hughes Aircraft Company ("Hughes"), is a major employer in the Southern California area. Until July 10, 1992, Senter was employed as a "Timekeeper A" at Hughes' Microelectronics Systems Division ("MSD") located in Rancho Santa Margarita, California. Hughes produces, and sells, "high tech" aerospace and electronic equipment for military and commercial use. The company is organized into several *groups* and *divisions* (usually associated with particular product lines) which operate out of a number of different facilities (plants) at various locations in Southern California. Within the company, a particular "plant" is customarily identified with the group or division operating the plant. Reference to such entity is often made simply by its location. (*App. 20* and *App. 23-26* and *App. 28-29*).

At all times during his employment, Senter was a member of defendant Labor Union. The terms and conditions of Senter's employment were covered by a collective bargaining agreement ("CBA") between his employer and his union. Said CBA was

---

2. Robert B. Reich. Labor Day 1995, Commentary. "Perspective on Labor: Meet the Frayed-Collar Workers Getting the Boot." *Los Angeles Times*, September 4, 1995, B9

commonly referred to as "the Southern California Agreement"[3] because most of the Hughes *groups* and *divisions* operating in Southern California, including MSD, were party to said agreement. (*App. 3* and *App. 8-9*). Relocating "plants," or moving work from one location to another, or establishing new facilities, is not an uncommon occurrence at Hughes. The Southern California CBA, therefore, contained a "successorship" clause that binds any "successor or assignee of the employer" to the terms of that CBA. (*App. 26-27*). In addition, per "Supplemental Agreement # 11," Hughes promised that in the event of a transfer of jobs to a "facility established in the San Diego area," it would "offer" the Union the opportunity to represent the transferred employees "on the same basis as all other bargaining unit employees covered by the current Collective Bargaining Agreement."[4]

For reasons not relevant here, the Union, also, had a separate collective bargaining agreement with Hughes' Industrial Products Division ("IPD") and the Hughes Technology Center ("HTC") located in Carlsbad, California.[5] That separate CBA, was known as "the

---

3. Union President, Jackson, averred to the trial court that: "The Southern California Agreement covers a bargaining unit of all production, maintenance, shop clerical employees employed in factory areas, and all employees in the job classifications listed in the Appendices of this Agreement and who are employed by its various facilities including Rancho Santa Margarita], and referred to in NLRB certifications and applicable orders and agreements. Senter was employed at Rancho Santa Margarita, which was part of Hughes' Industrial Electronics Group ("IEG"). In the Appendix of job classifications for IEG, "Timekeeper A" is included.

4. Supplemental Agreement #11, dated November 2, 1991 states, in relevant part:

> "The Company agrees that in the event it may hire or transfer employees in the bargaining unit classifications to any facility established in the San Diego area, it will offer EAST, Local #1553, the opportunity to represent them, on the same basis as all other bargaining unit employees covered by the current Collective Bargaining Agreement."

5. Carlsbad is in the "San Diego area." To wit, it is a municipality in San Diego County, California.

Carlsbad Agreement."[4] (*App. 9* and *App. 28-29*). It covered only the employees working for those two Hughes divisions. However, in early 1992, Hughes made a side agreement with the Union to provide that the Carlsbad Agreement would be integrated "en toto" into the Southern California Agreement. The membership at IPD and HTC agreed to the provision. (*App. 4*).

In late 1991 or early 1992, Hughes informed the Union of its decision to consolidate and merge its MSD operations with its IPD operations and, as a result, to move the MSD product lines from its plant in Rancho Santa Margarita, to its plant in Carlsbad (a move of approximately 50 miles). Hughes explained that the decision was based on the high costs of operating the Rancho Santa Margarita facility, the shrinking business for the MSD product lines, and the greater efficiencies that would result from combining similar product lines in one facility. Hughes told the Union that it intended to have a totally integrated work force in Carlsbad and that the two bargaining units "would become one." (*App. 9*).

Thereafter, representatives from Hughes and the Union met to negotiate over the effects of the "division merger" decision. The negotiations were informally conducted in various restaurants and kept "secret" from the rank and file union membership. Hughes averred, in declarations to the court, that the negotiations focused primarily on the following issues: (1) protecting the seniority rights of the bargaining unit employees at Rancho Santa Margarita; (2) determining who would be transferred to Carlsbad; and (3) integrating the job classifications and wage structures of Rancho Santa Margarita and Carlsbad. Hughes averred that it proposed, and

---

4. Hughes' Corporate Manager of Employee and Labor Relations, Kenneth King, averred: "Under the Carlsbad Agreement, the bargaining unit is defined as all factory production, maintenance and warehouse employees as listed in Appendix 'C' of this Agreement and who are employed by its Carlsbad, California Area plants of the Industrial products Division, and Hughes Technology Center, Hughes Aircraft company, and referred to in the NLRB Certification in Case Number 21-RC-6197 and the applicable NLRB Order and Consent Election Agreement. Appendix of the Carlsbad Agreement lists the hourly job classifications covered by such agreement. "Timekeeper" is not a job classification under Appendix B.

the Union agreed that certain "support" job classifications[7] would not be transferred to Carlsbad because they would be duplicative of functions already performed by Carlsbad employees. Timekeeping was one of the job classifications that was not going to be transferred to Carlsbad. Hughes also informed the Union that it would not transfer electrical and plant maintenance employees because those functions were already filled by Carlsbad employees. (*App. 10*).

As a result of their negotiations, Hughes and the Union agreed that when MSD moved to Carlsbad, and the plant in Rancho Santa Margarita closed, 55 MSD bargaining unit functions were to be transferred to Carlsbad. The MSD operations and IPD operations were to be kept separate in the Carlsbad plant, and all of the transferred MSD employees retained their full Rancho Santa Margarita-MSD seniority rights in Carlsbad. (*App. 25-26*). Moreover, Hughes and the Union both agreed that, after the move, the Southern California Agreement was to be applied to, and would continue to operate in, Carlsbad (or at least in the MSD portion of the Carlsbad plant). (*App. 26* and *App. 29-32*). In fact, the Union and Hughes concede that the Southern California Agreement survived the closure of the Rancho Santa Margarita plant. They do not dispute that the MSD portion of the Carlsbad plant is the "successor" to the closed Rancho Santa Margarita plant and the "assignee" of the Southern California Agreement. (*App. 26-27*).

The IPD operations in Carlsbad did not have the job classification of "timekeeper." The Carlsbad Agreement did not require IPD or HTC to have a timekeeper; but, the Southern California Agreement obligated Hughes to provide for unionized timekeeping at MSD and at the other *groups and divisions* (plants) covered by that CBA. (*App. 28*). Senter was MSD's only timekeeper. (*App. 39-31*).

Hughes informed Senter, in March 1992, that he would not be transferred to Carlsbad but would be laid off instead. On July 10, 1992, Senter was one of about 70 bargaining unit employees who

---

7. What Hughes meant by "support" jobs was left undefined, but Senter disagreed that timekeeping is a classification. He maintained that the function of timekeeper, which is concerned with the collection and auditing of labor data, is directly related to the work performed by those involved in producing a product.

were laid off and not transferred to the Carlsbad facility.

2. The Union's breach of duty of fair representation.

Upon being informed that he would not be transferred to Carlsbad, Senter met with Union officials in order to remind them that the Southern California CBA expressly requires MSD to have a timekeeper in its bargaining unit, and that when MSD moved to Carlsbad his right to that job would have to move also. (*App. 2*). Prior to his layoff, on March 16, 1992, Senter filed an initial grievance to grieve the fact that Hughes had no right to "delete" his job classification. (*App. 24*). Hughes denied the grievance as premature because Senter had not been laid off. (*App. 10*). The Union agreed and declined to prosecute the grievance further.

Shortly after his layoff, Senter filed another grievance alleging that Hughes violated the Southern California Agreement when he was laid off because his timekeeping position, a bargaining unit job under the Southern California Agreement, was being performed by a non-bargaining unit employee at Carlsbad, which is a direct violation of the CBA.[8] Accordingly, he sought a transfer to the Carlsbad facility. (*App. 10*). He also alleged that, irrespective of any right to transfer to Carlsbad, his job at Rancho Santa Margarita had not ceased when he was laid off. (*App. 29-31*).

The Union filed and processed Senter's grievance in Carlsbad. Pursuant to the terms of the grievance procedure outlined in the Southern California CBA, the Union met with Hughes on July 30, 1992 for the "Step Two" meeting.[9] In addition, the Union met with

---

8. Section F(1) of the Southern California CBA, in relevant part, states:

> The Employer agrees that salaried and other non-bargaining unit employees shall not perform work regularly assigned to Bargaining Unit employees . . .

9. "The 'Step Two' grievance meeting shall consist of the following: For the Company: The Department manager (or equivalent level) and a Labor Relations representative.

(continued...)

Hughes for "informal arbitration"[10] on August 15, 1992. (*App. 11*). Though, apparently, the Union had found sufficient substance in Senter's grievance to pass it through these two steps, the grievance process thereafter ground to an unexplained and unwarranted halt. Without giving Senter a reason for the change in attitude, the Union declined to process the grievance to arbitration, professing, simply, that it found the grievance to be meritless. [At the summary judgment motion, the Union provided the explanation that the CBA "specifically provided that Hughes would have the right to close down the Rancho Santa Margarita facility if it saw fit to do so." Moreover, the Union professed, "Senter's layoff did not violate the Southern California Agreement because: (1) bargaining unit employees at Rancho Santa Margarita did not have the right to displace a less senior employee at the Carlsbad facility, and (2) timekeeping work is not bargaining unit work at the Carlsbad facility."] (*App. 11*).

For its part, Hughes said that it denied this grievance for the following reasons: (1) after the MSD operations were transferred, there was no need for a full-time timekeeper at the Rancho Santa Margarita facility; (2) there was nothing in the Southern California Agreement precluding Hughes from shutting down the Rancho Santa Margarita facility and moving its MSD operations to Carlsbad; (3) there was no provision in the Southern California Agreement requiring Hughes to transfer Senter to Carlsbad when the MSD operations were moved; and (4) timekeeping was not a bargaining unit classification at the Carlsbad facility. (*App. 11*).

On September 23, 1992, the Union informed Senter that it would no longer pursue his grievance.

9.(...continued)

For the Union: A Union Business Agent and a Senior Steward certified for the Division where the grievance occurred."

10. "Informal Arbitration: If the grievance is not settled in Step Two, and if it is not being processed in the Group/Division Grievance Resolution Committee, and the Union wishes to process it further, then the grievance may be submitted into informal arbitration."

3. The courts' failure to afford a fair hearing.

Because the Union refused to pursue his grievance against Hughes further, Senter took his cause to the courts. On March 17, 1993, Senter filed a complaint in state court alleging causes of action for breach of the collective bargaining agreement against Hughes, breach of duty of fair representation against the Union, and conspiracy to deny rights under the collective bargaining agreement against both defendants. Later, Senter amended his complaint to add a fourth cause of action for violation of Sections 923 and 1122 of the California Labor Code against both defendants. The Union properly removed this action to federal court on the ground that the amended complaint states a cause of action under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. (*App. 12*).

In November 1993, Hughes and the Union moved for summary judgment in the United States District Court for the Central District of California. Senter opposed their motions. The district court granted summary judgment for Hughes and the Union on the belief that *Vaca vs. Sipes*, 386 U.S. 171, 190-193 instructs that to determine whether a Union's decision not to pursue a member's grievance to arbitration breached the duty of fair representation,

> "the Court need not ask whether Senter's grievance was legitimate -- rather, it need simply determine whether the Union's investigation of Senter's allegations was arbitrary, discriminatory, or in bad faith."

The district court concluded that "(b)ecause the Union did not handle his grievance improperly, Senter has not demonstrated a breach of the duty of fair representation." (*App. 16*).

Senter believed that the district court's judgment was in error and appealed the decision to the Ninth Circuit Court of Appeals, urging, *inter alia*, that determining whether a Union's discretionary judgment not to pursue a member's grievance to arbitration breaches the duty of fair representation, requires the court to evaluate the strength of the grievance. The appeals court agreed with Senter that, under *Peters vs. Burlington N.R.R.*, 931 F. 2d 534 (9th Cir. 1991), the

court has such obligation. (*App.1-2*).

Accordingly, the appeals court professed to have evaluated the strength of Senter's grievance of having a contractual right to have his job moved to Carlsbad when the division he worked for (MSD) relocated to Carlsbad. The court determined, *sua sponte*, without asking for briefing from the parties or hearing argument on the point, that the CBA "does not vest rights in employees by virtue of a particular division they work for, but rather by virtue of their being employed at a particular Hughes plant." (*App. 3*). This *sua sponte* finding and conclusion by the appeals court is not only plainly erroneous and is without any substantiation in fact, it is, also, in contradiction to admitted conduct of the parties and the agreed facts of the case.

To alert the court to its error, Senter filed a timely Petition for Rehearing in the Ninth Circuit Court (*App. 18-31*), setting forth therein all the facts the court overlooked in coming to its *sua sponte* finding.

On June 7, 1995, the court of appeals denied the petition for rehearing (*App. 7*), and let the previously rendered decision stand.

The instant petition for a writ of certiorari to the Ninth Circuit Court followed.

—o—

REASONS WHY THE PETITION SHOULD BE GRANTED

The Court's discretionary jurisdiction is invoked, hereby, on two separate grounds.

(1) This Court is asked to exercise its power of supervision over the Ninth Circuit Court of Appeals under Rule 10(1)(a). Petitioner submits that the appeals court, in declining his petition to rehear the appeal (*infra*, Appendix "D" App. 18-31) after having decided the appeal on a point not raised, not briefed, and not argued by the parties, "has so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of this Court's power of supervision" and order the court below to grant the rehearing.

[Petitioner further submits that the circumstances presented here point so plainly to procedural error, that a grant of certiorari, on the above stated ground, would not require a full hearing before this Court. Summary disposition without oral argument, pursuant to Rule 16-1, for the limited purpose of remanding the case to the Ninth Circuit to rehear the appeal, would be entirely proper.]

(2) Additionally, the petition is "certworthy" under Rule 10(1)(c), for this case presents a ripe and "important question of federal law which has not been, but should be, settled by this Court." To wit: In the nearly thirty years since this Court decided *Vaca vs. Sipes*, has the balance of power between labor and management shifted so decidedly in favor of the employer that the principle of organized labor's "fair representation," enunciated in *Vaca vs. Sipes*, 386 U.S. 171, 190 (1967), can no longer be counted on to adequately safeguard the unionized worker's right of equal access to court?

I. CERTIORARI SHOULD BE GRANTED TO INVOKE THE COURT'S SUPERVISORY POWER

A.

Deciding the Appeal on a Point not Raised, not Briefed, and not Argued, and Denying a Party's Timely Request to be Heard on the Point, so Violates the Right to "Fair Procedure" as to Cry out for an Exercise of this Court's Power of Supervision.

On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary.[11] Rule 10.1(a) recognizes the appropriateness of the grant of certiorari where the federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this courts's power of supervision." In Justice Stevens' words: "As the court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." [12]

Though the right of appeal to a higher court has been held not to be essential to due process in judicial proceedings [*McKane vs. Durston*, 153 U.S. 684 (1893)], the lofty common law principle of "fundamental fairness" embodied in the "Due Process" Clause of the Fourteenth Amendment, dictates that where a hearing before an appellate tribunal is afforded to litigants, such hearing must include an opportunity to present one's views on the points of law and fact upon which the appellate decision is to rest. In *Hannah v. Larche*, 363 U.S. 420 (1960) this Court said: (W)hen governmental agencies

---

11. *McNabb v. United States*, 318 U.S. 332 (1943), involving a question of administration the criminal justice in the federal courts, is generally considered as the Court's first recognition of its supervisory power over lower federal court proceedings. See also *Mallory v. United States*, 354 U.S. 449 (1957); *Elkins v. Unites States*, 364 U.S. 206 (1960); *Hobby v. United States*, 468 U.S. 339 (1984)

12. *Florida v. Rodriguez*, 469 U.S. 1, 7, (Stevens, J., dissenting).

adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." Appellate review of a case -- particularly where the review is *de novo,* as it is when a summary judgment is reviewed -- "is a proceeding where binding determinations are made that directly affect the legal rights of individuals." No less a standard of fair play and due process than that imposed upon governmental agencies should attend an appeal hearing in the courts of the federal circuit.

"Due Process" in a given situation may be an elusive concept, but certainly, adequate notice of the legal point or issue upon which an appeals decision is to be based and a reasonable opportunity to present a party's position on such point, are basic both to due process and fair procedure. When such opportunity is not provided by the court below, this Court should, and must, exercise its supervisory power to afford the parties that opportunity.

Of particular import here is the fact that the appeals court -- in deciding the appeal on a point not raised by the parties and not developed in the record -- has disregarded its own written policy. To wit, the Ninth Circuit has a **written policy** that if a panel is considering deciding a case upon the basis of a significant point not raised by the parties, it should consider requesting additional briefing and oral argument.[13]

In this case, the situation is aggravated by the fact that the appeal was decided without oral agrument (see footnote** at, *App. 1*), and additional briefing was specifically requested, via Senter's petition for rehearing, and was denied by the court.

Though the reviewing court has power to affirm a decision on any ground that is fairly presented in the record, to decide a case on a point raised *sua sponte* by the court without giving the parties an opportunity to respond, violates every man's basic sence of fairness. The one restraint on the court's ability to affirm on any ground is that a party on appeal should not be surprised by a new issue on which the party did not have an opportunity to develop a factual record. The Ninth Circuit Court is, in fact, in agreement with that view. See for instance, *United States v. Salazar,* 805 F.2d 1394 (9th

---

13. Ninth Circuit, General Order 4.2, set forth hereinabove at page 3.

Cir. 1986), where the court would not affirm a conviction based on a theory it raised *sua sponte* at oral argument when the defendant would be unfairly deprived of an opportunity to respond to the factual allegations pertinent to the theory. That Petitioner was deprived of an opportunity to respond to the factual allegations pertinent to the appeals court's theory of the case, is plainly evident on the record.

Under such circumstances, it is clear that this case **must**, at the very least, be remanded to the Ninth Circuit for further hearings on the appeals court's *sua sponte* theory of the case.

It might interest this Court to know that, in circumstances such as this case presents, the Legislature in California has statutorily imposed the duty on that State's Supreme Court to summarily order a remand. See, *Adoption of Alexander*, 44 Cal 3d 875, 864 (1988), where the California high court, in granting review and ordering a remand to the court below, made pointed to the mandate of California statutory law:

> [California] Government Code § 68081, which provides in pertinent part: "Before . . . a court of appeal . . . renders a decision . . . based upon an issue which was not proosed or briefed by any party to the proceeding, the court **SHALL** afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford such an opportunity, a rehearing shall be ordered upon timely petition of any party. [original emphasis].[14]

B.

The Decision Below is Plainly Wrong

Though the erroneousness of the decision below is not this Court's primary focus in granting certiorari, the decision of the court of appeals, in this case, is so totally devoid of evidentiary support, and

---

14. The entire California Government Code § 6808 is set forth hereinabove at page 3.

so unjust, and so plainly wrong, as to render it unconstitutional under the Due Process Clause of the Fourteenth Amendment. A review of the facts of this case, and particularly an examination of the matters set forth in the appended "(Denied) Petition for Rehearing" (*App. 18-31*), will make the denial of *substantial* due process, that occurred here, patently obvious.

Whether the decision of the court of appeals is so totally devoid of evidentiary support as to render it unconstitutional under the substantial Due Process guarantees of the Fourteenth Amendment, turns not the question of sufficiency of the evidence, but on whether the decision rests upon any evidence at all. See, *Washington v. United States*, 357 U. S. 348 (1958), where a federal conviction was reversed without elaboration "because of the insufficiency of the evidence."

Petitioner repectfully submits that there is here no evidence at all to support the decision of the court of appeals. A denial of the substantial due process right has occurred.

C.
A Summary Remand Order is Appropriate

In fact, the decision of the appeals court, particularly in face of the denial of the petition to rehear the appeal, is so clearly erroneous, and so plainly in violation of the Ninth Circuit's own stated rule of procedure, which states:

> "If a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it shall give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon that particular point."

that full briefing and argument before this Court would be a waste of time.

Rule 16.1 proclaims that an appropriate order in a given case "may be a summary disposition on the merits." Accordingly, this Court should grant certiorari and remand the case to the court of appeals so that the matters called to the attention of the appeals

court in the Petition for Rehearing (*infra*, App. 18-31) could be fully briefed, and be considered, and be corrected by the court below in compliance with its stated policy.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE AN IMPORTANT ISSUE

A.

This Case Presents an Important Question of Whether, in this new Era of Employer Dominated "Labor-Management Cooperation," the Unionized Employee's Right of Equal Access to the Court is Abridged by the Wide Latitude Given to a Union's Decision not to Arbitrate the Employee's Grievance.

In the prsent "new world order" of global economic competition and the current spirit of ever-increasing "labor-management cooperation" fueled by the rapidly declining power of the labor union, the time is ripe for this Court to reexamine the issue of when and under what circumstances the individual organized worker's rightful access to the court, to sue his employer for a breach of the employment contract, is impermissibly infringed.

The relationship between the corporate employer and organized labor in America has undergone a significant change in the last ten to fifteen years. When this Court decided *Vaca vs. Sipes*, 386 U.S. 171, in 1967, the ability of organized labor to represent the employment interests of the American worker through collective bargaining was far greater than it is today. In the rush to maximize profits and remain competitive in the new world of the 1990s, the hard-working American employee and wage earner has become the "forgotten American." The restructuring of the American economy, largely through corporate mergers and a downsizing of the workforce, has led to a situation where employers are dominant in the labor market in every sense.

Kevin Phillips, the renowned political analyst and observer of the American scene, describes the present day labor-management relationship as follows:

> "Labor is no longer a threat. . . . Management no longer trucks in strikebreakers from the other side of the country; now they move plants . . . Organized labor, which has diminished into a kind of old-age home for leaders in their 70s with bigger memories than muscles, may now be on the verge of a generational change . . . But, today's imbalance in favor of business and finance gives blue-collar America a chance to pitch a new social contract, conjoining frayed white-collar America in a new shake for the ordinary employee. "[15]

In the restructured economy of the 1990s, new guidance from the Court is needed on the respective rights and duties of employers, workers, and labor unions when a breach of the employment contract, i.e., collective bargaining agreement, is alleged. In *Vaca vs. Sipes, supra,* the Court directed that a unionized worker has access to the court to sue his employer for the breach only if he or she can first show that the union breached its duty of "fair representation" in not prosecuting the union member's grievance.

B.

The Present, Nearly Unfettered Discretion the Courts accord a Union's Decision not to Proceed with a Worker's Grievance, Improperly Restricts the Union Member's Right to Sue.

That a Union member has severely restricted his individual right of access to the court in exchange for the collective power of his Union, is set down in *Vaca vs. Sipes* "fair representation" doctrine. Union members have access to the courts to sue their employers over an alleged breach of the collective bargaining agreement, only if the union member can first demonstrate that the Union has breached its duty of fair representation to the member.

---

15. Kevin Phillips. *Los Angeles Times,* "Opinion" Section, "Blue and White Collar Labor: Fighting Big Interests." September 3, 1995

The basis and scope of the duty of "fair representation was explained by this Court in *Del Costello vs. Teamsters* 462 U.S. 151, 164, fn. 14 (1983) as follows:

> The duty of fair representation exists because it is the policy of the national Labor Relations Act to allow a single labor organization to present collectively the interests of all employees within a unit, thereby depriving the individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the the duty of the representative organization to serve the interests of all its members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Over the years since *Vaca* and *Del Costello*, the courts have accorded a union extremely wide latitude in the representation of its members. Courts have been particularly reluctant to interfere with a union's "decision" (judgment) not to pursue a grievance absent a showing of a union's arbitrary exercise of its power. For instance, the duty of fair representation is not breached by mere negligence. *Castelli v. Douglas Aircraft Co.*, 752 F2d 1480 (9th Cir. 1985); See also, *Steelworker's v. Rawson*, 495 U.S. 362 (1990) instructing that a union does not owe a duty of care to its members. The district court below relied on *Fristoe vs. Reynolds Metals*, 615 F2d 1209 (1980) for the proposition that a court need not even examine a union's expression of a "judgment" to determine whether the duty of fair representation has been breached. (*App. 16*).

The logical result of this unfettered discretion granted the union to make "judgment calls" as to whether to pursue a member's grievance, is to deny the union member the right to sue his employer over his employment situation.

It is respectfully submitted that such unfettered control by the union over an employee's grievance amounts to an improper

restriction of the employee's constitutional guaranteed right of equal protection under the law, and equal access to court. It also violates the rights guaranteed to members of labor oranizations by 29 U.S.C. § 411(a)(4), which provides:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding. . . ."

C.

The Shield of "Fair Representation" Accorded a Union Should not Accrue to the Benefit of an Employer who Violates the Provisions of a Collective Bargaining Agreement.

The result of the Appellate Court's decision to ignore the evidence and to uphold the Union's right to exercise discretionary judgment despite convincing evidence of the Union's failure to represent the interests of its wronged member fairly, improperly shields the defendant employer from the consequences of its wrongful actions.

Petitioner's grievance, in this instance, represented, in fact, no threat at all to the continued existence or survival of the Union, nor would the proper prosecution of his grievance have an adverse effect on the rights of any other Union member. Simply because Petitioner's case was unique, and pursuing the grievance to full arbitration may have been a significant economic drain on the shrinking resources of the Union, is insufficient justification for declining to represent on the aggrieved Petititoner's claim. Under such circumstances, to invoke the shield of protection afforded the Union in no way guarantees the survival of the Union. It merely lets the "guilty" employer go free.

In the face of the unprecedented economic and industrial changes that have taken place over the last decade or so, our laws

must assure that economically powerful employers, such as Hughes, understand that they may not continue, at their arrogant and arbitrary whim, to violate collective bargaining agreements with the knowledge that they can do so with impunity.

—o—

CONCLUSION

In his recent Labor Day 1995 commentary, Secretary of Labor Robert Reich observed that "new laws and rules are needed." This case is a rare and timely opportunity for this court to provide guidance and instruction on what such "new laws and rules" are, or should be.

WHEREFORE, for these various reasons, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

OCTOBER 3, 1995

Respectfully submitted,

ERIKA W. SENTER
Attorney at Law
4199 Campus Drive
Suite 700
Irvine, California 92715
tel (714) 854-5309
fax (714) 854-4897

Counsel of Record
for Petitioner
William T. Senter

APPENDIX "A"

APPEALS COURT,
MEMORANDUM OF DECISION

FILED
April 20, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM T. SENTER, Plaintiff-Appellant,	)	No. 94-55359
v.	)	D.C. No. CV-93-02252-KN
HUGHES AIRCRAFT COMPANY, ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553, a Labor Union, et al., Defendants-Appellees.	)	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Submitted April 3, 1995**
Pasadena, California

Before: NOONAN, O'SCANNLAIN, and LEAVY, Circuit Judges.

William Senter ("Senter") appeals from the district court's summary judgment in favor of defendants Hughes Aircraft Co.

---

* This disposition is not suitable for publication and may not be cited to or by the courts of this circuit except pursuant to 9th Cir. R. 36-3.

** The panel unanimously finds this case appropriate for submission on the briefs and without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

("Hughes") and Electronic and Space Technicians Union, Local 1553, AFL-CIO ("Union"). Senter argues that the district court erroneously: (1) granted summary judgment in favor of Hughes on his claim alleging layoff in breach of the collective bargaining agreement and in favor of the Union on his claim for breach of its duty of fair representation by failing to pursue his grievance against Hughes to final arbitration,[1] (2) concluded that his state law claims under Cal. Labor Code §§ 923 and 1122 were preempted by § 8 of the National Labor Relations Act ("NLRA"), and 3 denied his motion for reconsideration.

(1) **Senter's Claims against Hughes and the Union**

A good faith discretionary judgment of the Union not to pursue Senter's claim to final arbitration precludes a finding of breach of its duty of fair representation even if that judgment was erroneous or negligent. *Stevens v. Moore Business Forms, Inc.*, 18 F. 3d 1443, 1447-48 (9th Cir. 1994). In order to determine whether the Union's decision qualifies as a good faith discretionary decision we first evaluate the strength of Senter's grievance against Hughes. *Peters v. Burlington N.R.R.*, 931 F. 2d 534, 541 (9th Cir. 1991).

Senter makes two breach of contract contentions:

The first is based on rights he believes he has under the Southern California Collective Bargaining Agreement ("Southern California Agreement"). After being notified of the transfer of the Microelectronic Systems Division to the Carlsbad Plant, Senter met with Union officials in order "to remind them that the Southern California CBA expressly requires MSD (Microelectronic Systems Division) to have a timekeeper in its bargaining unit." Accordingly, he argues that when Hughes moved the Microelectronic Systems Division to Carlsbad, his unionized timekeeper job and his right to that job would also move.

---

1. Senter brought these claims under 28 U.S.C. § 185 (a) which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Southern California Agreement, however, does *not* vest rights in employees by virtue of the particular division they work for, but rather by virtue of their being employed at a particular Hughes' plant. In the same paragraph of the Southern California Agreement which Senter relies on to claim that timekeeping is part of the bargaining unit, the Agreement also provides that the bargaining unit is defined by the *plants* it covers, and not by employment in particular Hughes' product lines or divisions:

> BARGAINING UNIT
>
> The Employer recognizes the Union as the sole and exclusive Bargaining Agent for all production, maintenance, shop clerical employees employed in factory areas, and all employees in the job classifications listed in the Appendices of this Agreement and *who are employed in its El Segundo, Fullerton, Newport Beach, [sic] Santa Margarita, Malibu, Torrance, Canoga Park, Long Beach, Irvine area plants*, and the Corporate Headquarters located in Los Angeles, CA, and referred to in NLRB certifications and applicable orders and agreements. Excluded from the Bargaining Unit are all supervisors, all administrative, professional, engineering and office employees, confidential employees, all plant protection and security employees, and all Finance Department employees, *except timekeepers*, all welders and maintenance electricians. (Emphasis added.)

The Southern California Agreement, therefore, by its terms protects Senter's unionized timekeeper job only at the Rancho Santa Margarita Plant and other plants covered by that agreement to which Senter may have seniority bump rights. Senter's claim that the Southern California Agreement requires that Hughes unionize timekeeping for the Microelectronic Systems Division operations when moved to a facility not covered by the Southern California Agreement is unfounded.

Article II, Section B of the Southern California Agreement provides that, "[M]anagement shall have the right . . . to determine the extent to which the Plants or any unit of the Plants shall be operated or shut down." Senter does not challenge Hughes' right to close the Rancho Santa Margarita Plant and move the

Microelectronic Systems Division operations to the Carlsbad-Plant. Hughes had no obligation to transfer him under the Southern California Agreement.

Senter also contends that he has a right to timekeeping under the integrated collective bargaining agreement resulting from the adoption of the Carlsbad Agreement "en toto" as an addendum to the Southern California Agreement. However, even if Senter is correct, and the integration did apply all of the provisions of the Southern California Agreement to the Carlsbad Plant, and therefore made timekeeping part of the bargaining unit at Carlsbad, Senter has presented no evidence indicating that he had any bump rights, or other contractual rights, to that job at the Carlsbad plant.

In short, the Union and Hughes presented evidence that timekeeping at Carlsbad was not unionized, and that even if timekeeping had been unionized, Senter would have had no contractual rights to that position. In view of the weakness of Senter's claims, the Union's decision not to pursue Senter's claim to final arbitration due to its lack of merit was a legitimate exercise of discretionary judgment. *Cf., Burlington N.R.R.*, 931 F. 2d at 540. Having reviewed Senter's additional claim of a conspiracy between Hughes and the Union to deprive him of his position and finding it meritless, we hold that Senter has failed to present sufficient evidence raising a genuine issue of material fact regarding the Union's breach of its duty of fair representation. Summary judgment in favor of the Union and Hughes was appropriate.

(2) **Preemption Under the NLRA**

Senter argues that the district court erred in ruling that his state law claims under Cal. Labor Code §§ 923 and 1122[2] were preempted

---

2. Section 923 provides:

> [I]t is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid.

(continued...)

by federal law, and that the district court abused its discretion by not remanding these claims to state court after granting summary judgment in favor of the defendants on his other federal claims. Senter's arguments are meritless.

When a federal court determines that removal jurisdiction was *improvidently* granted over a case involving claims all of which are arguably preempted by sections 7 or 8 of the NLRA, a district court should remand to the state court to determine whether such claims are in fact preempted. *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1400-02 (9th Cir. 1988). In the present case, however, removal of the case was *not* improvidently granted since the district court had federal subject matter jurisdiction over Senter's claims against Hughes and the Union under 28 U.S.C. § 185(a). Once the district court resolved these federal claims, it still possessed discretionary jurisdiction over Senter's remaining state claims under its supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

The district court correctly determined that Senter's state claims would be preempted by Section 8 of the NLRA, 29 U.S.C. § 158.[3]

2.(...continued)
Section 1122 provides:

> Any person who organized an employee group which is financed in whole or in part, interfered with or dominated or controlled by the employer or any employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby. Said injured party shall recover the damages sustained by him and the costs of suit.

3. The pertinent part of § 8 of the NLRA, 29 U.S.C. § 158 provides:

> (a) It shall be an unfair labor practice for an employer -- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .
> * * * *
> (b) It shall be an unfair labor practice for a labor organization or its agents -- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . .

It is well settled law that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 616 (9th Cir. 1981) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)).

Senter presents no meritorious argument indicating that the district court's decision to exercise supplemental jurisdiction was an abuse of discretion.

(3) **Denial of Motion for Reconsideration**

We conclude that the district court did not abuse its discretion in denying Senter's motion for reconsideration in light of Senter's failure: 1) to pursue discovery diligently prior to summary judgment, 2) to move for a Fed. R. Civ. P. 56(f) continuance *prior* to summary judgment, and 3) to provide the court with any grounds sufficient to merit reconsideration as provided by the district court's Local Rule 7.16. *Qualls By & Through Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir. 1994) (internal quotation omitted; emphasis in original), and *see* discussion in District Court's Order Denying Senter's Motion for Reconsideration and Hughes' Request for Sanctions, ER at 100-102.

AFFIRMED.

APPENDIX "B"

APPEALS COURT
ORDER DENYING A REHEARING

FILED
June 7, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM T. SENTER, Plaintiff-Appellant,	)	No. 94-55359
	)	D.C. No.
v.	)	CV-93-02252-KN)
HUGHES AIRCRAFT COMPANY, ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553, a Labor Union, et al., Defendants-Appellees.	)	ORDER

Before: NOONAN, O'SCANNLAIN, and LEAVY, Circuit Judges.

The Petition for rehearing is DENIED.

APPENDIX "C"

TRIAL COURT ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Filed, December 15, 1993
Entered, December 22, 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM T. SENTER, Plaintiff, v. HUGHES AIRCRAFT CO. et al Defendants.	)	CV 93-2252 KN (GHKx) ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

After considering the papers submitted, the Court **GRANTS:** (1) defendant Hughes Aircraft Company's ("Hughes") motion for summary judgment; and (2) defendant Electronic and Space Technicians Local 1553's ("the Union") motion for summary judgment. Hughes and the Union are each **ORDERED** to prepare and file a proposed judgment that comports with the facts and law contained herein **within (20) days of the date of this order.**

I. Findings of Fact

The following facts are not in material dispute.

Until he was laid off on July 10, 1992, plaintiff William T. Senter ("Senter") was employed by defendant Hughes as a "Timekeeper A" at its Microelectronics Systems Division ("MSD") in Rancho Santa Margarita, California. During his employment, Senter was a member of defendant Union, and the terms and conditions of his employment

were covered by a collective bargaining agreement which was entered into between the Union and Hughes ("the Southern California Agreement")[1]

The Union also entered into a separate collective bargaining agreement with Hughes' Industrial Products Division and the Hughes Technology Center that covers Hughes' employees in Carlsbad, California ("the Carlsbad Agreement").[2]

In late 1991 or early 1992, Hughes informed the Union of its decision to move the MSD product lines from Ranch Santa Margarita to Carlsbad. Hughes explained that its decision was based on the high costs of operating the Rancho Santa Margarita facility, the shrinking business for the MSD product lines, and the greater efficiencies that would result from combining similar product lines in one facility. King Decl., ¶ 4, at 3. Hughes intended to have a totally integrated work force in Carlsbad, and thus the two bargaining units under the Southern California Agreement and the Carlsbad Agreement "would become one." Id.

Thereafter, representatives from Hughes and the Union met to negotiate over the effects of Hughes' decision to shut down its Rancho Santa Margarita facility. Id., ¶ 5, at 3; Jackson Decl., ¶ 7, at

---

1. The Southern California Agreement covers a bargaining unit of "all production, maintenance, shop clerical employees employed in factory areas, and all employees in the job classifications listed in the Appendices of this Agreement and who are employed by its various facilities including Rancho Santa Margarita], and referred to in NLRB certifications and applicable orders and agreements." Jackson Decl.., Exh. 151, at 1 (copy of the Southern California Agreement). Senter was employed at Rancho Santa Margarita, which was part of Hughes' Industrial Electronics Group ("IEG"). In the Appendix of job classifications for IEG, "Timekeeper A" is included.

2. Under the Carlsbad Agreement, the bargaining unit is defined as follows: "all factory production, maintenance and warehouse employees as listed in Appendix 'C' of this Agreement and who are employed by its Carlsbad, California Area plants of the Industrial products Division, and Hughes Technology Center, Hughes Aircraft company, and referred to in the NLRB Certification in Case Number 21-RC-6197 and the applicable NLRB Order and Consent Election Agreement." King Decl., Exh. B, at 10 (copy of the Carlsbad Agreement). Appendix of the Carlsbad Agreement lists the hourly job classifications covered by such agreement. "Timekeeper" is not a job classification under Appendix B.

3. These negotiations focused primarily on the following issues: (1) protecting the seniority rights of the bargaining unit employees at Rancho Santa Margarita; (2) determining who would be transferred to Carlsbad; and (3) integrating the job classifications and wage structures of Rancho Santa Margarita and Carlsbad. Hughes proposed, and the Union eventually agreed, that for purposes of efficiency, certain "support" job classifications would not be transferred to Carlsbad because they would be duplicative of functions already performed by Carlsbad employees. Timekeeping was one of the job classifications that was not going to be transferred to Carlsbad. Similarly, Hughes also informed the Union that it would not transfer electrical and plant maintenance employees because those functions were already filled by other Carlsbad employees.

As a result of these negotiations, Hughes informed Senter in March 1992 that he would not be transferred to Carlsbad, but that he would be laid off instead. Thereafter, but prior to his layoff, Senter filed a grievance under the Southern California Agreement. Hughes denied the grievance as premature because Senter had not been laid off.

On July 10, 1992, Senter was one of about 79 bargaining unit employees who were laid off and not transferred to the Carlsbad facility. Shortly thereafter, Senter filed another grievance in which he alleged that Hughes violated the Southern California Agreement when he was laid off because his timekeeping position, a bargaining unit job under the Southern California Agreement, was being performed by a non-bargaining unit employee at Carlsbad. Accordingly, Plaintiff sought a transfer to the Carlsbad facility.

The Union filed and processed Senter's grievance against Hughes. Pursuant to the terms of the grievance procedure outlined in the Southern California Agreement, the Union met with Hughes on July 30, 1992 for the "Step Two" meeting.[3] In addition, the Union

---

3. "The 'Step Two' grievance meeting shall consist of the following:

For the Company: The Department manager (or equivalent level) and a Labor Relations representative.

For the Union: A Union Business Agent and a Senior Steward certified for the Division where the grievance occurred." Jackson Decl., Exh. 151, at 89.

met with Hughes for "informal arbitration"[4] on August 15, 1992.

After considering the arguments, Hughes denied this grievance for the following reasons: (1) after the MSD operations were transferred, there was no need for a full-time timekeeper at the Rancho Santa Margarita facility; (2) there was nothing in the Southern California Agreement precluding Hughes from shutting down the Rancho Santa Margarita facility and moving its MSD operations to Carlsbad; (3) there was no provision in the Southern California Agreement requiring Hughes to transfer Senter to Carlsbad when the MSD operations were moved; and (4) timekeeping was not a bargaining unit classification at the Carlsbad facility.

The union then reviewed Hughes' decision regarding the grievance and considered correspondence from Senter and his attorney on this issue. The Union decided that the transfer of work from the Rancho Santa Margarita to the Carlsbad facility did not violate the Southern California Agreement because this Agreement specifically provided that Hughes would have the right to close down the Rancho Santa Margarita facility if it saw fit to do so.[5] Moreover, the Union decided that Senter's layoff did not violate the Southern California Agreement because: (1) bargaining unit employees at Rancho Santa margarita did not have the right to displace a less senior employee at the Carlsbad facility, and (2) timekeeping work is not bargaining unit work at the Carlsbad facility. Accordingly, the Union concluded that Senter's grievance had no merit and declined to pursue the grievance to arbitration.

Despite determining that Senter's grievance lacked merit, the Union still attempted to assist Senter by asking Hughes to transfer Senter to Carlsbad to handle additional timekeeping requirements

---

4. "Informal Arbitration: If the grievance is not settled in Step Two, and if it is not being processed in the Group/Division Grievance Resolution Committee, and the Union wishes to process it further, then the grievance may be submitted into informal arbitration." Jackson Decl., Exh. 151, at 90.

5. Article II, Section B of this Agreement specifically states that: "Provided such does not violate other terms of this Agreement, management shall have the right . . . to determine the extent to which the Plants or any unit of the Plants shall be operated or shut down." Jackson Decl., Exh. 151, at 4.

because of the merger. Hughes informed the Union that it did not need an additional timekeeper since it already had one at Carlsbad and only 55 Rancho Santa Margarita employees were to be transferred. On September 23, 1992, the Union informed Senter that it would no longer pursue his grievance.

On March 17, 1993, Senter filed this action in state court alleging causes of action for breach of the collective bargaining agreement against Hughes, breach of duty of fair representation against the Union, and conspiracy to deny rights under the collective bargaining agreement against both defendants. In April 1993, Senter amended his complaint to add a fourth cause of action for violation of Sections 923 and 1122 of the California Labor Code against both defendants.

In April 1993, the Union properly removed this action to federal court on the ground that the amended complaint states a cause of action under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.

Defendants Hughes and the Union now move for summary judgment. Senter opposes their motions. The Court **GRANTS** summary judgment for Hughes and the Union for the reasons set forth below.

II. Legal Analysis

A. Summary Judgment Is Appropriate Where There Is No Genuine Issue of Material Fact And The Moving Party Should Prevail As A Matter Of Law

The Court should enter summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc., Rule 56(c). A dispute as to a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

B. Senter's State Law Claims Arising Under The Collective Bargaining Agreement Are Preempted by Section 301 Of the LMRA

As a preliminary matter, the Court clearly has jurisdiction over this action under Section 301 of the LMRA, which confers upon the district courts jurisdiction to enforce collective bargaining agreements

in industries affecting interstate commerce. Indeed, "all rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce arise under Federal law. State law does not exist as an independent source of private rights to enforce collective bargaining contracts." Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1212 (9th Cir. 1980) (citing Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers, 376 F.2d 337, 339-40 (6th Cir. 1967), aff'd, 390 U.S. 557 (1968)). See also Castaneda v. Dura-Vent Corp., 648 F.2d 612, 616 (9th Cir. 1981) (holding that "jurisdiction exists under section 301 only to the extent that the dispute is focused upon and governed by the terms of the collective bargaining agreement.").

In this case, Senter asserts three causes of action that arise out of Senter's alleged rights under the Southern California Agreement: (1) breach of the collective bargaining agreement against Hughes, (2) breach of the duty of fair representation against the Union, and (3) conspiracy to deny rights under the collective bargaining agreement against both defendants. The Court finds that all three causes of action can be recharacterized as claims under Section 301 of the LMRA.

C. Hughes And The Union Prevail As A Matter Of Law On Senter's Cause Of Action For Violation Of California Labor Code Sections 923 And 1122 Because This Claim Is Preempted By The National Labor Relations Act; As Such, The National Labor Relations Board Has Exclusive Jurisdiction Over Such Claim

Senter's remaining claim is one for violation of California Labor Code Sections 923[6] and 1122[7] that set forth California's public policy

---

6. Section 923 provides: "In the interpretation and application of this chapter, the public policy of this State is as follows: Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his

(continued...)

prohibiting the commission of unfair labor practices by unions and employers against employees. See, e.g., Chavez v. Sargent, 52 Cal. 2d 162, 205 (1959) (holding that Section 1122 is in pari materia with Section 923). Specifically, Senter claims that the Union failed to act independently of Hughes for Senter's protection, and was "supported, financed, interfered with, dominated and/or controlled by" Hughes during the defendants' negotiations concerning the merger of the Rancho Santa Margarita and Carlsbad MSD work forces. Notice of Removal, Exh. 2, at 11-12 (copy of first amended complaint).

The Court finds that this claim essentially alleges that both the Union and Hughes have engaged in unfair labor practices under Section 8 of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158.[8] The law is well-settled that "[w]hen an activity is arguable subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." Castaneda, 648 F.2d at 616 (citing San Diego

---

6.(...continued)
employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or mutual aid or protection."

7. Section 1122 states that: "Any person who organizes an employee group which is financed in whole or in part, interfered with or dominated or controlled by the employer or any employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby. Said injured party shall recover damages sustained by him and the costs of suit."

8. Section 8(a) provides in pertinent part: "It shall be an unfair labor practice for an employer -- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29 U.S.C. § 158(a) (1) and (2).

Section 8(b) provides in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents -- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . ." 29 U.S.C. § 158(b) (1) (A).

Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959)).

Accordingly, the Court holds that Senter cannot prevail on this claim because, as a matter of law, the Court has no subject matter jurisdiction over this claim.

D. Both Hughes And The Union Prevail On Senter's Remaining Section 301 LMRA Claims

1. Senter Cannot Maintain His Claims Against Hughes Because He Failed To Proceed To Arbitration Against Hughes

The law is well-settled that when a collective bargaining agreement provides that arbitration will be the exclusive remedy for employee grievances, an employee may not bring an action against the employer instead of seeking arbitration, except where the employee shows that the Union breached its duty of fair representation by failing to pursue arbitration. See Fristoe, 615 F.2d at 1214-1215; Vaca v. Sipes, 386 U.S. 171, 184 (1967). Accord Green v. Hughes Aircraft Co., 630 F. Supp. 423, 427 (S.D. Cal. 1985). See also Castaneda, 648 F.2d at 617 ("While employees may sue their employer for breach of a collective bargaining contract[,] . . . employees must attempt to exhaust the contractual grievance procedures before seeking judicial relief.").

Here, Senter concedes that he did not proceed to arbitration on his grievance or that arbitration is the exclusive grievance procedure to be followed.[9] Rather, he contends that the Union breached its duty of fair representation by not proceeding to arbitration on Senter's behalf. In effect, if the Court finds that the Union did not, as a matter of law, breach its duty of fair representation to Senter, then both the Union and Hughes prevail: the Union, because it did not breach its duty of fair representation; and Hughes, because Senter failed to exhaust his bargaining agreement remedies.

---

9. The Southern California Agreement provides in pertinent part: "A grievance concerning a layoff or discharge must be filed in writing . . . and processed in Step Two of the Grievance Procedure . . . ." Jackson Decl., Exh. 151, at 91; and "In the event the grievance is not settled or disposed of in Step Two . . . or in informal arbitration, and the Union wishes to process it further, they may submit it to arbitration . . . ." Id., Exh. 151, at 94.

2. The Union Did Not Breach Its Duty Of Fair Representation

To prove a breach of duty of fair representation, Senter must show that the Union's decision not to pursue his grievance to arbitration was arbitrary, discriminatory, or in bad faith. Fristoe, 615 F.2d at 1214 (quoting Vaca, 386 U.S. at 190). To decide whether the Union's decision was arbitrary, the Court need not ask whether Senter's grievance was in fact legitimate -- rather, it need simply determine whether the Union's investigation of Senter's allegations was arbitrary, discriminatory, or in bad faith. Id. Indeed, "[i]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or a jury found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced." Id. (citing Vaca, 386 U.S. at 192-93).

Having examined the evidence presented by the parties, the Court cannot conclude that the Union acted arbitrarily, discriminatorily, or in bad faith. In an affidavit submitted by recording secretary John C. Owens ("Owens"), the Union representative assigned to handle Senter's grievance, Owens states that he participated in negotiations with Hughes representative Conrad Santos regarding the grievance, that the Union decided that Hughes had not violated the Southern California Agreement for the reasons described in Section I above, and that he sent Senter a letter stating the Union's position that it would not pursue his grievance to arbitration. Owens Decl., ¶¶ 3-11, at 2-4. Owens further states that "the Union's decision not to proceed on the issues raised in Senter's grievance was based solely on the Union's view of the merits of the grievances [sic]." Id., ¶ 11, at 4.

Because the Union did not handle his grievance improperly, Senter has not demonstrated a breach of the duty of fair representation. Accordingly, the Court finds that the Union prevails as a matter of law because its decision not to pursue arbitration was not arbitrary, discriminatory, or in bad faith. The Court also finds that Hughes prevails as a matter of law because Senter failed to

proceed to arbitration on his grievance.[10]

3. Senter's Conspiracy Cause Of Action Also Fails

In his first amended complaint, Senter alleges that "Hughes and the Union . . . consented, agreed, and conspired with one another to deprive and deny Plaintiff the rights, privileges, and benefits which accrued to him under the collective bargaining agreement at issue in this lawsuit." Notice of Removal, Exh. 2, at 10.

Notwithstanding that Senter cannot bring forth a valid cause of action against Hughes under the Southern California Agreement because of his failure to first proceed to arbitration, Senter cannot prevail on his conspiracy claim. As discussed in Section I above, both Hughes and the Union have presented ample evidence that Senter's bargaining rights were not violated, and therefore, the Union and Hughes did not conspire to violate any such rights. Moreover, Senter has presented no credible evidence to raise a genuine issue of material fact regarding the same.

Accordingly, the Court finds that both Hughes and the Union prevail on this issue.

III. Conclusion

In sum, because no genuine issues of material fact exist, the Court **GRANTS** Hughes' and the Union's motions for summary judgment.

IT IS SO ORDERED.

DATED: December 15, 1993

DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

---

10. Even assuming that Senter's action against Hughes for violation of the Southern California Agreement is properly before this Court, Senter does not prevail on the merits because he cannot show that he had a contractual right under either the Southern California or Carlsbad Agreements to perform the timekeeping function at Carlsbad.

APPENDIX "D"
(Denied) PETITION FOR REHEARING
TO US COURT OF APPEALS, 9TH CIRCUIT
NO. 94-55359
FILED, May 5, 1995

UNITED STATES COURT OF APPEAL
NINTH CIRCUIT

WILLIAM T. SENTER,
Plaintiff/Appellant,

vs.
HUGHES AIRCRAFT COMPANY,
ELECTRONIC AND SPACE TECHNICIANS
LOCAL 1553, a Labor Union, and
DOES 1 THROUGH 25, INCLUSIVE,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT
Honorable DAVID V. KENYON, Judge Presiding

PETITION FOR REHEARING

ERIKA W. SENTER
ATTORNEY AT LAW
Calif. Bar No. 97872
4199 Campus Drive, Suite 700
Irvine, Calif. 92715
tel. (714) 854-5309
fax. (714) 854-4897

Attorney for Appellant
William T. Senter

TABLE OF CONTENTS
(omitted)

TABLE OF AUTHORITIES
(omitted)

TO THE CLERK OF THE COURT:
On April 20, 1995, the Court entered its Memorandum of Judgment on the appeal of WILLIAM T. SENTER ("Senter") from the district court's grant of summary judgments in favor of HUGHES AIRCRAFT COMPANY ("Hughes") and ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553 ("Union"). Senter now, respectfully, petitions the Court to rehear that appeal.

I. INTRODUCTION AND STATEMENT OF POINTS RAISED IN THE PETITION.

In the judgment of Senter's counsel, a rehearing of this appeal is warranted because highly material points of fact were overlooked in reaching the decision. Though the Court, in its Memorandum of April 20, 1995, has accurately expressed the relevant law, the conclusion the Court reached was faulty. To wit:

Senter claimed that, as the bargaining unit timekeeper for Hughes' Microelectronic Systems Division ("MSD") in Rancho Santa Margarita, he had a contractual right to have his job moved to Carlsbad when the division relocated there. The Court stated: "In order to determine whether the Union's decision [not to pursue Senter's claim to final arbitration] qualifies as a good faith discretionary decision we first evaluate the strength of Senter's grievance against Hughes. *Peters v. Burlington N.R.R.*, 931 F.2d 534, 541 (9th Cir. 1991)." [Page 2 of Memorandum.] In accordance with that directive, the Court then examined Senter's claim and found that:

(a). "The Southern California Agreement does *not* vest rights in employees by virtue of the particular division they work for, but rather by virtue of their being employed at a particular Hughes plant, . . . [because Senter's] bargaining unit is defined by the *plants* it covers, and not by employment in particular Hughes' product lines or divisions." [Memorandum, page 3]

and,

(b). "Senter has presented no evidence indicating that he had any . . . contractual rights to that job at the Carlsbad plant." [Memorandum, page 4.]

On these findings the Court concluded that: "In view of the weakness of Senter's claims, the Union's decision not to pursue Senter's claim to final arbitration due to its lack of merit was a legitimate exercise of discretionary judgment." [Memorandum, page 4].

Senter respectfully submits that this conclusion is erroneous for it is based on findings that are faulty because they overlook the following material facts:

1. Because in the context of the CBA both words were understood to connote the business entity, the difference between "plant" and "division" was *not* a disputed issue between the parties and, therefore, was not discussed in the appeal.

The term "plant" or "plants" as used in the Southern California Bargaining Agreement, and as understood by the parties, is a term of art which is used interchangeably with the word "division" to connote not the physical facility or geographic site of the particular Hughes' establishment in question, but to connote the business enterprise that Hughes conducts at the location involved. Listing the included employment that defines the bargaining unit by location of the plant that houses the business, rather than by the business name of the plant, is merely a shorthand convenience for easy reference. It is undisputed that the CBA, expressly and by established custom, sets job rights (i.e. job definitions, seniority rights, grievance procedures, etc.) according to the business division or group involved and not by where the employment takes place. All parties always understood that the relevant thing was the business division involved and not the location of the business division.

2. The Court has overlooked the implication and significance of the "successorship" clause contained in the Southern California Agreement which binds "any successor or assignee of all or part of the employer" to the agreement.

Senter's grievance makes express reference to the

successorship clause (Article II, section E-1). [CR 17, Exh."C"; AtEOR 30[1]]. The matter was addressed in the Opening Brief at page, 9:14-16. However, since the parties admitted that the Southern California Agreement was applied and operative in Carlsbad (or, at least, in the MSD portion of the Carlsbad plant) after the move, the successorship obligation became essentially a "non-issue." But, if the Court's reading that the Southern California Agreement is correct and employment rights vest by plant, then the successorship provision would operate to bind the "successor" plant to the agreement. It is an undisputed fact that, as a result of the move, the work formerly performed at the plant in Rancho Santa Margarita was assigned to the plant in Carlsbad. Certainly therefore, the Carlsbad plant, or at least the MSD portion of that plant, became the "successor" to the Rancho Santa Margarita plant, and is by reason of that status, bound to honor the Southern California Agreement with respect to vested rights of all employees of MSD, including Senter.

3. In rejecting Senter's claim of a contractual right to have his job of unionized timekeeper for the MSD work force continued after the move to Carlsbad, the Court overlooks, as well, "Supplemental Agreement # 11"

Senter's grievance, also, explicitly refers to Supplemental Agreement # 11.[CR 17, Exh. "C"; AtEOR 34]. It is discussed in the Opening Brief at page 9. By that provision, Hughes promises the Union membership, including Senter, that their job rights under the Southern California Agreement would be continued in the new location in the event of a move "to any facility established in the San Diego area." Senter had a contractual right to expect that Hughes would honor that promise and would extend to him, in the new location, the seniority and the other vested employment rights that he enjoyed at Rancho Santa Margarita. Since, at the time of the move, Senter held senior rights to his job (no other unionized timekeeper

---

1. Senter continues herein the convention followed, in the parties' previous briefs, that "AtEOR" refers to Appellant's Excerpts of Record, and "AeEOR" refers to Hughes' Appellee Excerpts of Record.

had a right to replace him[2]), Senter had the contractual expectation that the seniority right to the job that he held at Rancho Santa Margarita would be moved to Carlsbad.

4. With respect to the fact that "Hughes and the Union presented evidence that timekeeping at Carlsbad was not unionized" [Memorandum, page, 4], the Court overlooked that this fact is entirely *immaterial* to Senter's right to be the unionized timekeeper for the MSD portion of the Carlsbad plant.

This is so, because the Carlsbad Agreement is, by its express terms, a contract that is limited to the employees of the "Industrial Products Division ("IPD") and Hughes Technology Center ("HTC") of the Hughes Aircraft Company." The very definition of "Employer" contained in the Carlsbad Agreement so limits the Agreement. [CR 17, Exh. "B"; AeEOR 65; also, Hughes' Brief at 7:8-14]. By operation of law therefore, the provisions of the Carlsbad Agreement, or the lack thereof, cannot, and do not, impact on the job rights of union members who are not employed by either IPD or by HTC. The mere relocation of MSD to Carlsbad, to share that plant site with IPD workers, did not recast MSD employees into IPD employees. Thus, the provisions of the Carlsbad Agreement do not apply and are immaterial to the job rights of MSD workers, including Senter.

5. Finally, in agreeing that Senter's grievance lacked merit in spite of the fact that "Senter's unionized timekeeper job (was protected) at the Santa Margarita Plant" [Memorandum, page 3], the Court overlooked that Senter also grieved that he was laid off *before* his job ended at the Rancho Santa Margarita plant.

It is undenied that employees, for whose time records Senter was customarily and regularly responsible, remained employed at the Rancho Santa Margarita plant site after Senter was laid off, and that the official "relocation" of MSD to Carlsbad occurred prior to

---

2. In its reply brief to the district court, Hughes suggested that Senter's rights to the timekeeping job were junior to those of a salaried accountant at Rancho Santa Margarita who had retained bump rights as a Timekeeper A. The issue is a "red herring" because the accountant had not exercised his bump rights and was, in fact at the time of the move, on leave from his accounting job on a long-term disability. No evidence was presented that the accountant ever sought his right to bump Senter.

Senter's layoff. [Opening Brief, 12:24-14:7 and footnote 5; Reply Brief, 13:18-20]. A significant point in Senter's grievance is his claim that the "closure" of the Rancho Santa Margarita plant and his layoff did not coincide, and that, therefore, it is evident that "closure of the plant" was a mere pretext for the layoff. Irrespective of the logic of this argument, however, under any reading of the Southern California Agreement, including this Court's, the taking away of Senter's job, while work remained at the Rancho Santa Margarita plant for which Senter had been regularly and customarily responsible, constitutes a material breach of the CBA and a violation of Senter's rights.

II. DISCUSSION

A.

THE TERM "PLANT" AS USED IN THE SOUTHERN CALIFORNIA AGREEMENT, AND AS UNDERSTOOD BY THE PARTIES, IS A TERM OF ART WHICH IS USED INTERCHANGEABLY WITH THE WORD "DIVISION" TO INDICATE THE BUSINESS ENTITY INVOLVED.

The difference between "plant" and "division" was not a disputed issue between the parties and, therefore, was not discussed in the appeal. Senter finds the Court's conclusion that, "(t)he Southern California Agreement does not vest rights in employees by virtue of the particular division they work for, but rather by virtue of their being employed at a particular Hughes plant," surprising, since this claim has never been made by defendants. The reason no such claim was made by the defendants is because they know and, the record reflects, that there is no essential difference between those terms as they are used in the CBA. In determining job rights, all parties always understood that the relevant designation was to the business operation or entity involved and not the physical location of that business entity.

For example:

In describing the procedure for "Installation of New and Revised Job Classifications," Section I of Article IV [CR 17 at pages 23-25 of Exh."C" the CBA provides:

> 1. Management may, in accordance with its operation requirements, delete, establish or revise Job

> Classifications together with Job Descriptions and raise of pay therefore. The employer agrees that it will promptly notify the Union President, by registered or certified mail of any such intent, and the Division, Divisions or Group where the Job is used or deleted.

* * *

> 6. This section shall not preclude a Group or Division from adding a new job classification per Supplemental Agreement #7 "Workforce Flexibility" that may include the combination of duties from existing job classifications into new job classifications.
>
> (Emphasis added)

Note: Senter's March 16, 1992 grievance (the first grievance) addressed the failure of Hughes to comply with Article IV, Section I for deleting, or revising, or combining his job classification. [See, Opening Brief, page 11]. If Hughes (or the Union) had legitimate concerns of "job duplication" pertaining to Senter's bargaining unit "Timekeeper A" classification at MSD, those concerns should have been aired in the hearing of the first grievance. They were not. The reason they were not is because both Hughes and the Union knew that Senter's job classification was unique, and that it had no relationship to whatever non-union timekeeping function existed in the IPD organization.

In providing for "Seniority" rights at Article XVIII of the Agreement [CR 17, Exh."C" page 64-69], the contract similarly uses the term "division." It states:

Section A. . . .

> 1. "Seniority" is defined as the length of service in a Job Classification except as otherwise provided herein. Seniority shall be applied to the job classifications in the bargaining Unit within a Group, or where applicable a Division Plant Site ... (at p. 64)

Section B. . . .

> 2. Present Job Classification seniority is measured by length of service in the presently-held Job Classification. In addition, an employee is also credited with seniority in his or her Group/Division ... (at p. 65)

Section D. . . .

> 1. An employee transferred by the Employer to another Group/Division Plant site shall continue to accumulate seniority. ... (at pp. 67-68)
>
> (Emphasis added).

Note: Senter was the only timekeeper the Rancho Santa Margarita Division had; his seniority standing was therefore not an issue in determining his right to be relocated to Carlsbad. Hughes admits that the relocated MSD employees retained, in Carlsbad, the seniority rights they had under the Southern California Agreement irrespective of any seniority rights of IPD employees. [Hughes' Brief, page 9]. Senter's vested job rights under the Southern California Agreement were entitled to receive like treatment; fair procedure and due process require it.

Likewise, in addressing "Grievance Procedure" in Article XXIV [CR 17 at pages 88-99] the CBA speaks in terms of "division" in setting out those rights. For instance:

> The step Two grievance meeting will consist of the following:
>
> For the Company: The Department Manager(or equivalent level) and a Labor Relations representative.
>
> For the Union: A Union Business Agent and the Senior Steward certified for the Division where the grievance occurred. (at page 89)
>
> (Emphasis added).

Note: It is undisputed that, at the Union's express direction to Senter, his Step Two hearing in July, 1992 (the second grievance), was processed and held in Carlsbad. Senter is informed and believes that no Senior Steward certified for MSD attended his grievance meeting, and that (in addition to all others), for that reason alone, his Step Two grievance meeting in July 1992 was an unfair procedure. [See, Opening Brief, page 14:8-19 and footnote 6].

In addition to the above quoted contract provisions, which establish clearly that the word "plant" as used in the bargaining unit definition of the Southern California Agreement connotes "division" and is intended to refer to the business entity housed at the named locations, the parties explored and resolved any ambiguities

concerning this issue in discovery.

To wit: Interrogatories #7, #8, #9, #10 and #11 directed to the Union, and Interrogatory #7 directed to Hughes, explored the parties' contentions concerning whether job rights under the Southern California Agreement vested by virtue of being employed at a particular plant, or whether they vested in the work performed at the plant. In each case the defendants answered that it was the work that was covered and not the plant where the work was performed. Both Hughes and the Union concede that the CBA which covered work at the Rancho Santa Margarita site continued to cover the work even though the work was relocated to Carlsbad. [CR 22; AeEOR 32:15 to 36:19, and AtEOR 8:25 to 9:8]

If the job rights of the relocated employees did not cease when they left Rancho Santa Margarita, it is obvious that the parties to the Southern California Agreement did not intend that the job rights vest by virtue of being performed in a particular location.

B.

THE COURT HAS OVERLOOKED THE SIGNIFICANCE OF THE "SUCCESSORSHIP" CLAUSE CONTAINED IN THE CBA.

The Southern California Agreement has an express "successorship" provision which provides at Article II, section E-1 that:

> This Agreement shall be binding on any successor or assignee of all or a major part of the Employer.

In his grievance, Senter specifically points Hughes and the Union to that provision. [AtEOR 4 and 9].

As stated, that the Southern California Agreement survived the closure of the Rancho Santa Margarita plant and operated in the Carlsbad plant after the move to protect the rights of MSD workers in Carlsbad is an admitted fact. It is, also, undisputed that, as a result of the move, the work formerly performed at the plant in Rancho Santa Margarita was assigned to the plant in Carlsbad. Thus, the Carlsbad plant, or at least the MSD portion of that plant, became the "successor" to the Rancho Santa Margarita plant.

Ostensibly, in compliance with the successorship provision of the CBA and, also, in compliance with the long established practice of "simply adding the new plant to the definition of the bargaining unit when a move occurs," Hughes and the Union did, in fact, continue the Southern California Agreement at the MSD portion of the Carlsbad plant. [See, Reply Brief, at 1:18-22; also, the Union's Interrogatory Answer No. 4; CR 22, Exh. 1; AeEOR 130:26-131:3].

Moreover, Hughes admits that it "acceded to the Union's request to keep the two bargaining units distinct" after the move and to "protect the seniority of those MSD employees relocated to Carlsbad." [Hughes' Brief, at 9:3-7].

A further indication still that the Carlsbad plant became the assignee of the Southern California Agreement, and that MSD employee rights vested in Carlsbad after the merger, is the undisputed fact that Senter's grievance was heard and processed, not in Rancho Santa Margarita (which had not yet closed at the time of Senter's grievance hearing), but in Carlsbad. Even though Senter was never employed in Carlsbad, his job rights under the Southern California Agreement were adjudicated at the Carlsbad plant. Such conduct is inconsistent with the claim that Senter had rights only at Rancho Santa Margarita. As said above, the CBA requires that grievances be heard and processed where they occur. [Opening Brief, at 14:8-12 and footnote 6].

C.
THE COURT, ALSO, OVERLOOKED "SUPPLEMENTAL AGREEMENT # 11"

Even if there were no "successorship" clause in the Southern California Agreement, Hughes is contractually bound to recognize, in Carlsbad, the job rights that were vested in Rancho Santa Margarita. In Supplemental Agreement # 11, Hughes promised the Union membership, including Senter, that their job rights under the Southern California Agreement would be continued in the new location in the event of a move "to any facility established in the San Diego area." Accordingly, Senter had a contractual right to expect that Hughes would honor that promise and would extend to him, in the new location, the seniority and the other vested employment rights that he enjoyed at the Rancho Santa Margarita site. Since, at

the time of the move, Senter held senior rights to his job (no other unionized timekeeper had a right to replace him[3]), Senter had the contractual expectation that the seniority right to the job that he held at Rancho Santa Margarita would be moved to Carlsbad.

D.

IT IS ENTIRELY IMMATERIAL TO SENTER'S JOB RIGHT THAT TIMEKEEPING AT IPD IN CARLSBAD WAS NOT UNIONIZED.

The Court concludes that Senter's job right claim is weak because "Hughes and the Union presented evidence that timekeeping at Carlsbad was not unionized." [Memorandum, page, 4]. That evidence, however, is entirely immaterial to Senter's right to be the unionized timekeeper for the MSD portion of the Carlsbad plant. By its express terms the Carlsbad Agreement does not cover the plant site in Carlsbad, but is limited to the employees of the "Industrial Products Division ("IPD") and Hughes Technology Center ("HTC") of the Hughes Aircraft Company." [CR 17, Exh. "B"; AeEOR 65; also, Hughes' Brief at 7:8-14]. At the outset, the "Employer" in the Carlsbad Contract is defined:

> THIS AGREEMENT is made and entered into at Carlsbad, California, this 4th day of March, 1989 by and between Industrial Products Division and Hughes Technology Center of the HUGHES AIRCRAFT COMPANY, a corporation, hereinafter referred to as the "Employer," and ELECTRONIC & SPACE TECHNICIANS, LOCAL 1553, AFL-CIO, hereafter referred to as the "Union." (at page 1)
>
> (Emphasis added)

Therefore, the contract in Carlsbad is not a plant-wide contract. It applies not to whoever works in the Carlsbad plant, but is limited, by

---

3. In its reply brief to the district court, Hughes suggested that Senter's right to the timekeeping job were junior to those of a salaried accountant at Rancho Santa Margarita who had retained bump rights as a Timekeeper A. The issue is a "red herring" because the accountant had not exercised his bump rights and was, in fact at the time of the move, on leave from his accounting job on a long-term disability. No evidence was presented that the accountant ever sought his right to bump Senter.

definition, to the employees of the Industrial Products Division ("IPD") and the Hughes Technology Center ("HTC"). Thus, the provisions of the Carlsbad Agreement, or the lack thereof, cannot impact on the job rights of union members, like Senter, who are not employed by either IPD or by HTC. The fact that MSD moved its operations to Carlsbad, and the fact that its workers share plant site space with IPD workers, did not recast MSD employees into IPD employees. Since the Carlsbad Agreement has application only to IPD and HTC employees, its provisions are entirely immaterial to the job rights of Senter as an employee of MSD under the Southern California Agreement.

E.

UNDER ANY READING OF THE SOUTHERN CALIFORNIA AGREEMENT, TAKING SENTER'S JOB FROM HIM WHILE WORK FOR WHICH HE WAS REGULARLY RESPONSIBLE REMAINED TO BE DONE AT THE RANCHO SANTA MARGARITA PLANT, IS A MATERIAL BREACH OF THE COLLECTIVE BARGAINING AGREEMENT.

Finally, the Court overlooked the fact that Senter grieved that he was laid off before his job ended at the Rancho Santa Margarita plant. At page 3 of the Memorandum, the Court recognized that "Senter's unionized timekeeper job (was protected) at the Santa Margarita Plant." It follows, therefore, that if Senter's job at Rancho Santa Margarita has not ended when he was laid off, his termination was a breach of the contract.

Neither Hughes nor the Union deny that employees for whose time records Senter was customarily and regularly responsible remained employed at the Rancho Santa Margarita plant after Senter's layoff on July 10, 1992. [Opening Brief, 12:24-14:7 and footnote 5; Reply Brief, 13:18-20]. Under any reading of the Southern California Agreement, including this Court's, taking Senter's job from him while work he was regularly responsible for remained to be done at the Rancho Santa Margarita plant, is a material breach of the CBA.

Moreover, a significant point in Senter's grievance is his claim that the "closure" of the Rancho Santa Margarita plant and Senter's

layoff did not coincide, and that, therefore, "closure of the plant" was a mere pretext for the layoff. Hughes admits that the official "relocation" of MSD to Carlsbad occurred prior to Senter's layoff. In its response to Senter's Interrogatories Hughes avers [CR 22; AeEOR 165 to 185]:

> RESPONSE TO INTERROGATORY NO.5:
> Specifically, the last full day of work in Rancho Santa Margarita for Microelectronic Systems Division was July 3, 1992. After the July 4th holiday, those employees who had been offered jobs in Carlsbad reported to work in Carlsbad. The Rancho Santa Margarita facility did not "close" because there were other divisions of Hughes operating out of that facility after the MSD product lines were no longer located there. (at AeEOR 172).

And, in response to a question concerning the timekeeping duties that Senter had been responsible for which remained at Rancho Santa Margarita after Senter's layoff:

> RESPONSE TO INTERROGATORY NO. 26:
> Hughes maintains that it did not breach any provision of the applicable CBA when the timekeeping duties for hourly workers who continued to work at the Rancho Santa margarita facility were not performed by Plaintiff. Although the employees were physically located in Rancho Santa Margarita after July 10, 1992, their time cards were being processed at Carlsbad. Accordingly, because Hughes and EAST agreed that there would be no bargaining unit timekeeper in Carlsbad, the timekeeping duties for those workers physically located in Rancho Santa Margarita was not covered by the collective bargaining agreement in effect after July 10, 1992.

Note: Hughes admits that the plant in Rancho Santa Margarita did not "close" after all, but that those who worked there were, nevertheless, no longer covered by the Southern California Agreement because MSD had moved to Carlsbad. This concedes that

Hughes regards workers' rights vested by the "division" that is housed in a plant and not by plant site. Note further, however: Hughes (and the Union) have admitted that the collective bargaining agreement in effect after July 3, 1993, at Carlsbad, for MSD workers, is the Southern California Agreement, which by definition of the bargaining unit must have its timekeeper be a bargaining unit member.

Senter was the only bargaining unit timekeeper that Hughes had for the Microelectronic System Division. If timekeeping duties for those employed by MSD continued to need to be performed, Senter had the contractual right to perform those duties. To lay Senter off on July 10, 1992, was a clear breach of the Southern California Agreement.

III. CONCLUSION.

For all the reasons herein stated Appellant, WILLIAM T. SENTER, respectfully requests that the Court grant him a rehearing of his appeal, and that the summary judgments entered against him in the district court on January 27, 1994 be ordered REVERSED.

DATED: May 3, 1995

Respectfully submitted,

ERIKA W. SENTER
Attorney for Appellant
4199 Campus Drive
Suite 700
Irvine, California 92715

[PROOF OF SERVICE - omitted]

APPENDIX "E"

EXTENSION OF TIME TO FILE WRIT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

August 25, 1995

Ms. Erika Senter
4199 Campus Drive
Suite 700
Irvine, CA 92715

Re: William T. Senter
v. Hughes Aircraft Company, et al.
Application No. A-183

Dear Ms. Senter:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on August 25, 1995, extended the time to and including October 5, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK
By Sandra Elliott Spagnolo
Assistant Clerk

[Notification List-omitted]